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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

L. L. Labov
Proc II

FILE: B-187381 B-187658

DATE: March 17, 1977

MATTER OF: American Can Company

DIGEST:

Provisions in solicitation which require bidders to certify that supplies offered will be manufactured in part from recycled materials as defined in solicitation are not unduly restrictive of competition where such conditions reasonably implement public policy embodied in statutes.

American Can Company (American Can) protests the allegedly restrictive provisions of invitations for bids (IFB) Nos. FPOP-FY-54626-A and FPOP-FY-54574-A issued on August 24 and September 29, 1975, respectively, by the General Services Administration (GSA). IFB FPOP-FY-54626-A solicited bids for a definite quantity of toilet tissue, paper towels and paper napkins. IFB FPOP-FY-54574-A contemplated a requirements contract for toilet tissue. GSA made partial awards under the solicitations on January 13 and 25, 1977, pursuant to a determination that the supplies were urgently required.

Each of the solicitations contains provisions which require bidders to certify that the supplies offered will be manufactured from paper stock comprised of a stated percentage of fibers reclaimed from post-consumer waste as defined in the solicitation. The solicitations also advised bidders that the failure to make the certification "will result in the rejection of the bid on the grounds of nonresponsiveness."

American Can alleges that there is no relationship between GSA's specification requirement--that the paper products contain specified amounts of certain types of reclaimed paper fiber--and any quality or performance characteristic of the product, and that there is no actual need for the specification requirement which is related to any use to which the products will be put. American Can maintains that it and other major paper manufacturers are restricted from bidding on such procurements because they lack the plant capacity to utilize post-consumer waste in the manufacture of their products, and, as a result, competition is unduly restricted and costs to the Government are increased.

GSA's stated purpose for its specification requirement is to alleviate the national solid waste disposal problem by encouraging the recycling of post-consumer waste through federal procurement. See 38 Fed. Reg. 29470, October 25, 1973. GSA does not deny that the challenged specifications have "nothing whatever to do with the use, performance or quality characteristics of the product," but asserts that its recycling requirements are authorized by Presidential directive and environmental legislation. GSA further asserts that the contracts awarded under the challenged invitations and other similar solicitations have been at reasonable prices.

American Can recognizes that social programs may be effectuated through Federal procurement. See, e.g., Buy American Act, 41 U.S.C. § 10a-d (1970) and Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1970). However, American Can maintains that express statutory authority is required to exempt agencies from the basic statutory requirement "that specifications and invitation for bids shall permit such full and free competition as is consistent with the procurement of the types of property and services necessary to meet the requirements of the agency concerned." 41 U.S.C. § 253 (1970). American Can's position is that GSA lacks such express authority.

GSA states that it initiated its specifications for recycled materials in response to the President's request for conservation of our paper resources. In addition to Executive "mandates," GSA believes the Solid Waste Disposal Act of 1965, 42 U.S.C. § 3253(a) (1970), which directed an investigation and study to determine "the use of Federal procurement to develop market demand for recovered resources," and the National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (1970), which directs the Federal Government to:

"* * * use all practicable means consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources to the end that the nation may

* * * * *

"(6) enhance the quality of renewable resources and approach the maximum obtainable recycling of depletable services."

constitute legislative authorization for its use of the recycling specifications.

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GSA also maintains that its specifications are consistent with the "non-mandatory" guidelines issued by the Environmental Protection Agency for the procurement of products containing recycled materials. Those guidelines state:

"Recommended procedures: specification review:

* * * * *

"(c) All agencies should revise specifications used in purchasing personal and real property so that all specifications require the inclusion of recycled material to the maximum extent practicable." 40 C.F.R. § 247.200-1 (1976).

Finally, GSA relies on the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, approved October 21, 1976, 90 Stat. 2795, which provides in Section 602(a), under the heading "Federal Procurement", that:

"(c) REQUIREMENTS-(1)(A) After two years after the date of enactment of this section, each procuring agency shall procure items composed of the highest percentage of recovered materials practicable consistent with maintaining a satisfactory level of competition. The decision not to procure such items shall be based on a determination that such procurement items-

(i) are not reasonably available within a reasonable period of time;

(ii) fail to meet the performance standards set forth in the applicable specifications or fail to meet the reasonable performance standards of the procuring agencies; or

(iii) are only available at an unreasonable price. Any determination under clause (ii) shall be made on the basis of the guidelines of the Bureau of Standards in any case in which such material is covered by such guidelines."

We agree with American Can that the general declarations of public policy referred to in Presidential messages, statutes, and regulations cited by GSA fall short of actual expression of

authority for GSA's specifications. While the Resource Conservation and Recovery Act of 1976, supra, will provide such "express authority," the Act, by its own terms, does not become effective until October 20, 1978. However, we do not believe the absence of express statutory authority is controlling on the issue.

We have stated that Federal agencies must buy from the source that satisfies the Government's needs at the lowest price, that agencies may not impose requirements (unjustified by procurement needs) which reduce competition or increase cost and that, as a general rule, the inclusion in a solicitation of terms and conditions which may tend to lessen competition or increase the probable cost to the Government is improper. 42 Comp. Gen. 1 (1962). On the other hand, we have also held that these general rules are not applicable to terms and conditions, although not specifically authorized or required by statute, which reasonably implement a public policy embodied in a statute. For example, we have sanctioned a procurement policy preference for labor surplus area concerns, even though such preference has its origin in the "policies" declared in the Defense Production Act of 1950, 50 U.S.C. § 2062 (1970), and in various Executive orders and supplementing directives issued to implement the policy, and not in any specific statutory authorization. See 40 Comp. Gen. 489 (1961).


Furthermore, we do not believe that in delaying the effective date of the Resource Conservation and Recovery Act of 1976, supra, for a 2-year period, Congress intended, in effect, to "repeal" the prior expressions of public policy which encouraged agencies to maximize purchases of recycled products. The hiatus, American Can maintains, was provided so that the public might participate in the development of implementing guidelines and so that industry might adjust its capacity to conform to new requirements. While it may be contemplated that industry and the public will make recommendations concerning the implementation of the Act, we find no indication that Congress intended to abrogate prior policy declarations and the actions thus far taken by Federal agencies in revising their specifications concerning recycled products. Indeed, we note that the paper manufacturing industry has already had over 3 years to "adjust" to GSA specifications for post-consumer waste. See 38 Fed. Reg. 29470, supra.

With regard to the increased cost to the Government which American Can believes results from the use of the challenged specifications, the Resource Conservation and Recovery Act of

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1976, supra, although not yet effective, embodies the Congressional policy in this area, and requires only that awards be made at reasonable prices, not at the lowest prices obtainable. GSA reports that it determines whether bids submitted are reasonable on the basis of prevailing market conditions, the availability of waste paper, price quotations in prior procurements and nonresponsive bids received. This appears to be an adequate basis to determine price reasonableness. We do not agree with American Can that GSA must test price reasonableness by accepting bids from suppliers which can meet the performance specifications, but not the environmental requirements, to determine whether unreasonably high prices are involved. Bidders that do not conform to the environmental requirements are not offering the products called for by the Government, and therefore, the price comparisons suggested by American Can would not be meaningful. Accordingly, we do not believe the procurements questioned are illegal.

American Can's final point is that GSA's specifications emphasize the environmental benefits associated with reducing "post-consumer waste" without affording adequate consideration to other "waste." American Can asserts, for example, that one of its mills is capable of making paper products entirely from saw dust, a waste product that does not fall within GSA's definition of post-consumer waste. In the context of a bid protest, our Office will not evaluate the various alternatives that may be available to implement the environmental statutes and policy on recycling. However, we do think that GSA should give appropriate consideration to other forms of waste products in connection with its resource conservation specifications.


Deputy Comptroller General
of the United States